INDEX

	Page
Motion of Joseph P. Lucia for Leave to File a Brief Amicus in Support of Claimant-Respondent	iv
Brief of Joseph P. Lucia as Amicus Curae	1
Opinion below; Jurisdiction and Statute involved	1
Questions presented	1
Statement	2
Interest of Amicus Curiae	3
Argument	4
Under the applicable criteria set forth by this Court, the constitutional rule newly recognized in *Marchetti* and *Grosso* should be retroactively applied	4
(1) Application of the *Stovall* test	6
(a) The purpose to be served by the new standards	6
(b) The extent of the reliance by law enforcement authorities on the old standards	8
(c) The effect on the administration of justice of a retroactive application of the new standards	10
(2) The government has conceded that partial retroactivity is proper in criminal cases — a concession that militates strongly in favor of full retroactivity	14
Conclusion	15

CITATIONS

Cases

Barber v. *Page*, 390 U.S. 719	13
Berger v. *California*, 393 U.S. 314	13
Bloom v. *Illinois*, 391 U.S. 194	9
Bruton v. *United States*, 391 U.S. 123	13
DeCesare v. *United States*, 390 U.S. 200	14
Delli Paoli v. *United States*, 352 U.S. 232	13
DeStefano v. *Woods*, 392 U.S. 631	14, 15
Duncan v. *Louisiana*, 391 U.S. 145	9

PAGE

Escobedo v. *Illinois*, 378 U.S. 478 12
Eskridge v. *Washington Prison Board*, 357 U.S. 214 12

Fuller v. *Alaska*, 393 U.S. 80 ..... 7, 11

Gideon v. *Wainwright*, 372 U.S. 335 ..... 12, 13
Gilbert v. *California*, 388 U.S. 263 ..... 9, 12
Graham v. *United States*, 407 F.2d 1313 5
Griffin v. *California*, 380 U.S. 609 ..... 7, 8, 9, 12
Griffin v. *Illinois*, 351 U.S. 12 ..... 12, 13
Grosso v. *United States*, 390 U.S. 62 ..... 1, *passim*

Jackson v. *Denno*, 378 U.S. 368 12
Johnson v. *New Jersey*, 384 U.S. 719 ..... 12, 14, 15

Lee v. *Florida*, 392 U.S. 378 ..... 7, 8, 9
Lewis v. *United States*, 348 U.S. 419 ..... 5, 8
Linkletter v. *Walker*, 381 U.S. 618 ..... 7, 11, 12

Mackey v. *United States*, 411 F.2d 504 5
Mapp v. *Ohio*, 367 U.S. 643 ..... 7, 8, 9, 11, 13
Marchetti v. *United States*, 390 U.S. 39 ..... 1, *passim*
Miranda v. *Arizona*, 384 U.S. 436 ..... 9, 12

Roberts v. *Russell*, 392 U.S. 293 ..... 12, 13

Stovall v. *Denno*, 388 U.S. 293 ..... 4, 5, 11, 14, 15

Tehan v. *United States*, 382 U.S. 406 ..... 8, 12

United States ex rel. Durocher v. *LaVallee*, 330 F.2d 303 12
United States v. *Kahriger*, 345 U.S. 22 ..... 5, 8
United States v. *Lucia*, ... F.2d 3, 11
United States ex rel. Milford v. *McMann*, 231 F. Supp. 731 12
United States v. *Tarrago*, 398 F.2d 621 14
United States v. *Wade*, 338 U.S. 218 ..... 9, 11

Williams v. *Alabama*, 341 F.2d 777 12
Witherspoon v. *Illinois*, 391 U.S. 510 13

Constitution, Statutes and Rules

U. S. Constitution, Fifth Amendment ..... 6, *passim*
18 U.S.C. § 371 2
26 U.S.C. § 4401 2
26 U.S.C. § 4403 2
26 U.S.C. § 4403 2
47 U.S.C. § 605 ..... 7, 9, 11
Fed. R. Crim. P., Rule 34 13

PAGE

Miscellaneous

Federal Offenders in the United States District Courts, 1965, pp. 84-85 10

Federal Offenders in the United States District Courts, 1966, Table D. 9 10

Federal Offenders in the United States District Courts, 1967, Table D. 7 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 8

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674, DONALD ANGELINI,

Claimant-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF JOSEPH P. LUCIA FOR LEAVE TO FILE A BRIEF AMICUS IN SUPPORT OF CLAIMANT-RESPONDENT

Joseph P. Lucia respectfully moves for leave to file a brief in support of the position of Claimant-Respondent in this cause. The written consent of both the Solicitor General of the United States, and Miss Anna R. Lavin and Mr. Edward J. Calihan, Jr., attorneys for the Claimant-Respondent, Donald J. Angelini, has been obtained and filed with the Clerk of the Court.

Mr. Lucia now has appeals pending on en banc rehearing in the United States Court of Appeals for the Fifth Circuit which turn on the question whether this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), should be applied retroactively. The fifth circuit panel which initially heard Mr. Lucia's appeals held *Marchetti* and *Grosso* fully retroactive and vacated Mr. Lucia's convictions under the federal wagering tax statutes. *United States* v. *Joseph P. Lucia*, Nos. 26316 and 26317 (5th Cir. Sept. 17, 1969). We have attached a copy of the court's opinion as Exhibit A. On October 2, 1969, the court, on its own motion, ordered the cases reheard en banc.

Angelini turns initially on the question whether the rationale of *Marchetti* and *Grosso* applies to forfeiture proceedings. If these cases are held applicable to forfeiture proceedings, the Court must squarely face the question whether *Marchetti* and *Grosso* are to be retroactively applied. Mr. Lucia's case would be controlled by a general determination of their retroactivity, *i.e.*, one which comprehended both criminal proceedings and forfeiture proceedings.

Angelini presents only the considerations involved in determining whether *Marchetti* and *Grosso* should be applied retroactively to forfeiture proceedings. As the United States has already conceded in *Angelini*, the considerations involved in determining whether *Marchetti* and *Grosso* should be applied retroactively in criminal cases are markedly different from those involved in forfeiture cases. It is possible to conclude, as has the Solicitor General, that they should be applied retroactively in criminal proceedings which were not final by the date of the decisions in *Marchetti* and *Grosso*, and yet should not be applied retroactively in forfeiture proceedings which were not final on

that date. *See* Brief for Petitioner at 29-31. The parties to *Angelini* cannot adequately present the distinctive issues raised in a criminal proceeding. These issues must be before the Court for full consideration of the general question of the retroactivity of *Marchetti* and *Grosso*.

Accordingly, Mr. Lucia respectfully submits that if the Court is to determine the general question of the retro-activity of *Marchetti* and *Grosso*, the considerations involved in a criminal proceeding such as his should be before the Court. Alternatively, Mr. Lucia submits that the considerations involved in a criminal proceeding such as his are so distinguished from those involved in a forfeiture proceeding that the Court's decision in *Angelini* should be specifically limited to forfeiture proceedings, reserving the question of retroactivity in criminal proceedings.

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UNITED STATES OF AMERICA,

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UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674, DONALD ANGELINI,

Claimant-Respondent.

BRIEF OF JOSEPH P. LUCIA AS AMICUS CURIAE

OPINION BELOW; JURISDICTION AND STATUTE INVOLVED

Amicus adopts Petitioner's statements of the opinion below, jurisdiction and the statute involved.

QUESTIONS PRESENTED

Whether this Court's decisions in *Marchetti* v. *United States,* 390 U.S. 39 (1968), and *Grosso* v. *United States,* 390 U.S. 62 (1968), should be applied with full retroactivity in forfeiture and criminal proceedings? Or, alternatively, whether the considerations involved in determining whether *Marchetti* and *Grosso* should be applied with full retroactivity in forfeiture proceedings and in criminal proceedings are so markedly different that only the issue of retroactive application in forfeiture proceedings should be de-

termined in the instant cause, with the question of retroactivity in criminal proceedings reserved?

STATEMENT

Amicus accepts the statements of the parties. However, for consideration of the general question of retroactivity of *Marchetti* and *Grosso*, the Court's attention should be given to the considerations raised by criminal proceedings such as Mr. Lucia's.

On September 18, 1964, Joseph P. Lucia was indicted on various counts for violation of provisions of the federal statutory scheme for taxation of illegal wagering. On September 25, 1964, Mr. Lucia pleaded not guilty to all counts of the indictment. After various pretrial proceedings, Mr. Lucia was rearraigned on January 18, 1965, and pleaded guilty to Count 12 of the indictment charging him with attempting to evade and defeat the excise tax upon wagers he had received by failing to make and file Form 730 (Tax on Wagering Return), by failing to keep records as required by 26 U.S.C. § 4403, and by various other acts of concealment, all in violation of 26 U.S.C. § 7201. The remaining counts of the indictment were dismissed.

That same day, a criminal information was filed charging Mr. Lucia and others with conspiracy to "willfully fail to pay the excise tax on wagers" imposed by 26 U.S.C. § 4401 in violation of 18 U.S.C. § 371. On February 1, 1965, Mr. Lucia pleaded guilty to this charge.

Mr. Lucia was then sentenced to consecutive terms of six months on the conspiracy charge and five years on the evasion charge, with fines of $10,000 imposed for each charge. Mr. Lucia has paid the fines and served the six month sentence. The five year sentence was suspended, but Mr. Lucia remains on probation. He further continues to suffer

various civil disabilities and onerous consequences from his convictions.

After the decisions in this Court in *Marchetti* and *Grosso* were handed down, Mr. Lucia filed motions in the nature of a writ of error coram nobis to vacate and set aside both of the convictions. The district court denied the writs. On September 17, 1969, a fifth circuit panel handed down an opinion holding *Marchetti* and *Grosso* fully retroactive and ordering the causes remanded for vacation of the convictions. *United States* v. *Joseph P. Lucia*, Nos. 26316 and 26317 (copy attached as Exhibit A). However, on October 2, 1969, the fifth circuit, on its own motion, ordered Mr. Lucia's appeals reheard en banc. His appeals are now pending before the fifth circuit.

INTEREST OF AMICUS CURIAE

Mr. Lucia's appeals pending on en banc rehearing in the United States Court of Appeals for the Fifth Circuit turn on the question whether this Court's decisions in *Marchetti* and *Grosso* are to be applied with full retroactivity. *See United States* v. *Joseph P. Lucia*, Nos. 26316 and 26317 (5th Cir. Sept. 17, 1969) at 2; Exhibit A at 2a.

In deciding *Angelini*, the Court must initially face the question whether the rationale of *Marchetti* and *Grosso* is applicable to forfeiture proceedings. If these cases are applicable to forfeiture questions, then the Court must deal with the question of the retroactivity of *Marchetti* and *Grosso*. A general determination of the retroactivity of *Marchetti* and *Grosso* that comprehended both forfeiture proceedings and criminal proceedings could be dispositive of Mr. Lucia's case. Mr. Lucia, therefore, has an interest in urging before the Court the considerations militating in favor of retroactivity in criminal proceedings, if the Court is to determine generally the question of *Marchetti* and

Grosso's retroactivity. Alternatively, if the Court is not disposed to consider the general question of *Marchetti* and *Grosso's* retroactivity, but limits its consideration to the issues raised by forfeiture cases, Mr. Lucia would urge the Court to delimit the rationale of its ruling to forfeiture proceedings, reserving the question whether they are retroactively applicable to criminal proceedings.

ARGUMENT

UNDER THE APPLICABLE CRITERIA SET FORTH BY THIS COURT, THE CONSTITUTIONAL RULE NEWLY RECOGNIZED IN MARCHETTI AND GROSSO SHOULD BE RETROACTIVELY APPLIED.

While there is a dispute as to the degree of the government's burden in urging prospective application, the parties are agreed that the following threefold test annunciated in *Stovall* v. *Denno*, 388 U.S. 293 (1967), is to be utilized for determining whether *Marchetti* and *Grosso* should be applied retroactively:[1]

> "(a) The purpose to be served by the new standards,
>
> "(b) The extent of the reliance by law enforcement authorities on the old standards, and
>
> "(c) The effect on the administration of justice of a retroactive application of the new standards." *Id.* at 297.

[1] The following definitions of categories of retroactivity are followed in this brief: a new rule is *partially retroactive* when it is applied to all pertinent cases that are in trial or on appeal — *i.e.*, not final — on the date the new rule is announced. A new rule is *retroactive* if it applies not only to all cases in trial or on appeal, but also to all previous judgments even though they are final. To distinguish retroactivity, the former is sometimes referred to as *full* or *total retroactivity*. This emphatic distinction shall be made only where the context makes it desirable.

The parties have limited their application of the *Stovall* test to consideration of whether *Marchetti* and *Grosso* should be retroactively applied in forfeiture cases. Amicus shall limit his argument to the retroactivity of *Marchetti* and *Grosso* in criminal proceedings,[2] Amicus submits that consideration of the question of *Marchetti* and *Grosso's* retroactivity in criminal proceedings reinforces the conclusion that the cases should be given full retroactivity in criminal and civil proceedings. Alternatively, Amicus submits that, if the Court should determine that *Marchetti* and *Grosso* should not be applied retroactively in forfeiture proceedings, the considerations militating in favor of full retroactivity in criminal proceedings are of sufficient

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[2] We are aware of only two cases where courts have treated the question of the retroactivity of *Marchetti* and *Grosso* in criminal proceedings involving alleged violations of the federal wagering tax laws. One, of course, is the fifth circuit panel's decision in *Lucia* (a copy of the opinion is attached as Exhibit A). The other is *Graham* v. *United States*, 407 F.2d 1313 (6th Cir. 1969). In *Graham*, the sixth circuit in a superficial and unpersuasive application of the *Stovall* test held that *Marchetti* and *Grosso* should be applied with only partial retroactivity (*i.e.*, only in causes that were not final as of the date of the *Marchetti* and *Grosso* decisions). *See* 407 F.2d at 1315.

In a different context, the seventh circuit held *Marchetti* and *Grosso* not to be retroactive. *Mackey* v. *United States*, 411 F. 2d 504 (7th Cir. 1969) *petition for cert. filed*, 38 U.S.L.W. 3086 (U.S. Aug. 29, 1969) (No. 529) "[D]efendant was charged not with failure to file the returns, nor even of a crime of gambling, but of evasion of income taxes." *Id.* at 509. *Mackey* should not be viewed as having any application to the question of retroactivity in criminal proceedings involving alleged violations of the federal wagering tax laws. As the court said in *Mackey*:

> "Whether the ruling of *Marchetti* and *Grosso* should be applied retroactively to defendants in the situation of *Kahriger* and *Lewis* themselves [citation omitted], who have claimed the privilege and have been convicted of failure to file the returns, presents considerations not before us, since in such cases recognition of the privilege would negate the very offense for which the defendants are imprisoned." *Id.* at 509.

weight and sufficiently distinct to require the Court either to hold the cases fully retroactive in criminal proceedings or to reserve decision until the issue is squarely presented to it.

(1) APPLICATION OF THE STOVALL TEST

(a) The Purpose to Be Served by the New Standards.

The general purpose of the rule in *Marchetti* and *Grosso* is to limit the federal wagering tax statutes to applications "consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment," 390 U.S. at 44. In the context of criminal proceedings, it therefore prevents the punishment of those who fail to comply with the requirements of the federal wagering tax statutes. 390 U.S. at 61. An obvious purpose of this rule is to protect persons from criminal punishment imposed by a statutory scheme that by its very implementation deprives persons of their Fifth Amendment rights. This purpose cannot be fully served without retroactive application. Unless it is applied retroactively, the criminal punishment of those convicted under the relevant federal wagering tax statutes in violation of what the Court now holds to be a right guaranteed by the Fifth Amendment will continue in varying degrees throughout the lives of the convicted parties.

It is important to note that the Fifth Amendment rights recognized in *Marchetti* and *Grosso* are not concerned with merely an evidentiary privilege. *Marchetti* and *Grosso* constituted a recognition that the federal wagering tax scheme made the exercise of a person's Fifth Amendment rights a violation of federal law. These cases place an effective limitation upon the government itself. They are a recognition that the methodology utilized in the federal wager-

ing tax statutes is not consonant with the rights guaranteed by the Fifth Amendment. It follows inevitably that many of those convicted under the federal wagering tax statutes in the past were convicted in derogation of their Fifth Amendment rights. Denial of these rights in the past went to the heart of the prosecution. Recognition of these rights constitutes a complete and effective bar to the governmental proceedings directed towards punishment of the exercise of the Fifth Amendment rights. Recognition of the retroactivity of *Marchetti* and *Grosso* will permit at least a partial purging from our history and our jurisprudence of convictions obtained by a process repugnant to our Constitution.

In contrast with *Marchetti* and *Grosso*, cases where retroactivity has been denied have been those where retroactive application would not serve the purpose of the rule. For example, the purpose of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), was to prevent unconstitutional searches and seizures. In denying retroactive application of *Mapp*, *Linkletter* v. *Walker*, 381 U.S. 618 (1965), correctly concluded that this purpose would not be served by retroactive application. Said the Court:

> "The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved. . . . [T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Id.* at 637.

See also Fuller v. *Alaska*, 393 U.S. 80, 81 (1968), which held *Lee* v. *Florida*, 392 U.S. 378 (1968), prospective only. Like *Mapp*, the purpose of *Lee* was to enforce the federal law in the future (§ 605 of the Federal Communications Act, 47 U.S.C. § 605).

Another example is the rule of *Griffin* v. *California*, 380 U.S. 609 (1965), which prevents adverse comments on a

defendant's failure to testify. The purpose of this rule is similar to that of *Mapp's* — to protect "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life. . . .'" *Tehan* v. *United States*, 382 U.S. 406, 416 (1966). Like *Mapp's* purpose, "a variant from . . . [*Griffin's*] standard cannot now be remedied." *Id.*

Unlike the purposes of *Mapp*, *Griffin* and *Lee*, which are primarily the preservation of one's privacy and the assurance of the future observance of federal law, *Marchetti* and *Grosso* are designed to prevent criminal punishment from being incurred due to the exercise of a constitutional right. While the purpose of *Mapp*, *Griffin* and *Lee* would not be served by retroactivity, it is clear that the purpose of *Marchetti* and *Grosso* would be served by retroactivity.

(b) The Extent of the Reliance By Law Enforcement Authorities on the Old Standards.

It is true that the Supreme Court has previously upheld the federal wagering tax statutes involved in *Marchetti* and *Grosso* against Fifth Amendment attack. *Lewis* v. *United States*, 348 U.S. 419 (1955); *United States* v. *Kahriger*, 345 U.S. 22 (1953). Federal law enforcement officials have, no doubt, relied upon these cases to continue the prosecution of violators of the federal wagering statutes. However, this highly limited and specific reliance is the only kind conceivably involved. The constitutional rule duly recognized in *Marchetti* and *Grosso* will affect only convictions that were obtained under the federal wagering tax statutes in derogation of the defendant's Fifth Amendment rights. Convictions obtained under any other substantive statutes will not be affected. Only federal law enforcement authorities are involved, since no state statutes are within the ambit of the new rule. Federal law enforcement authorities can scarcely be heard to base a complaint

upon their past reliance. The only convictions that could conceivably be upset would be those where the very violation for which the defendant was prosecuted was caused by the defendant's exercise of his rights under the Fifth Amendment.

In all the situations in which full retroactivity has been denied by this Court, the police and the prosecution could have behaved differently, and could have obtained a conviction by constitutional means, had they had the prescience to know what the Constitution required of them. If *Mapp* had been on the books, the police could have obtained warrants. If *Miranda* had been on the books, the requisite warnings could have been given or the police could have sought evidence other than a confession. If *Griffin* had been on the books, prosecutors could have avoided comment on the defendant's failure to testify. If *Lee* had been on the books, state prosecutors could have avoided offering evidence obtained in violation of § 605 of the Federal Communications Act, 47 U.S.C. § 605. If *Wade*[3] and *Gilbert*[4] had been on the books, lineups would have been conducted in a different way. If *Duncan*[5] and *Bloom*[6] had been on the books, trials would have been to a jury. To have made these landmark decisions fully retroactive would have meant, to paraphrase Judge Cardozo's famous remark, that the criminal must go free because the constable has blundered, even though there was no way the constable could have known he was blundering.

The present situation is wholly different. If *Marchetti* and *Grosso* had been decided four years earlier, there is no way that Mr. Lucia could have been successfully prose-

[3] *United States* v. *Wade*, 338 U.S. 218 (1967).
[4] *Gilbert* v. *California*, 388 U.S. 263 (1967).
[5] *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).
[6] *Bloom* v. *Illinois*, 391 U.S. 194 (1968).

cuted. No alternative would have been open to the prosecuting authorities, *since here the constitutional defect does not go to the method by which a crime is proved but to whether the conduct can constitutionally be made criminal.* In this circumstance there can be no weight given to reliance on the former decisions.

(c) The Effect on the Administration of Justice of a Retroactive Application of the New Standards.

The strongest indication that *Marchetti* and *Grosso* should be retroactive is the fact that their retroactivity would have only a minimal effect on the administration of justice. This is in sharp contrast to cases where retroactivity has been denied. The retroactive application of *Marchetti* and *Grosso* would concern only the very limited area of federal criminal law dealing with federal regulation of wagering. Retroactive application here would not open wide the jail doors. Prison sentences for wagering tax violations have been comparatively rare and almost always short. According to *Federal Offenders in the United States District Courts*, 1965, pp. 84-85, *ibid.*, 1966, Table D. 9, and *ibid.*, 1967, Table D. 7, of the 1936 persons convicted in federal courts in those three years of wagering tax violations, 1670 received either a suspended sentence, a fine, or probation. Only 266 were given jail sentences. The jail sentences of 171 offenders were for six months or less, and 70 other defendants received sentences ranging from seven to twelve months. Only 25 persons, then, were sentenced for more than one year. Of these, 10 sentences were for two years or less, 6 were between two and three years, and 9 were over three years. Indeed, since there can have been no new prosecutions since January 29, 1968, and convictions then on appeal have been vacated, it is likely that few if any persons are in federal prisons serving sentences

under these statutes. Thus the impact here of retroactivity would mean only that the civil rights of those past offenders, who are sufficiently interested in the matter to make a motion now asserting their constitutional rights, would be restored, through a proceeding such as that involved in *Lucia*. The retroactive application of *Marchetti* and *Grosso* would not require or invite new trials with the attendant problems of stale evidence and dim memories; instead, it would merely be a matter of vacating and setting aside convictions based on the federal wagering tax statutes.

The inconsequential effect on the administration of justice cause by retroactivity of *Marchetti* and *Grosso* is in sharp contrast to cases where retroactivity has been denied. In *Linkletter*, for example, the Court properly concluded that *Mapp's* retroactive application would have "tax[ed] the administration of justice to the utmost." *Linkletter* v. *Walker*, *supra* at 637. The *Mapp* rule, if retroactive, would have applied to evidence obtained by unreasonable search and seizure in any type of criminal case. Thus, in these cases the States would have been faced with the choice of releasing all prisoners — including murderers, rapists, and any other felons — convicted by such evidence, or retrying these prisoners. Retrials would have had to consider "the excludability of evidence long since destroyed, misplaced or deteriorated." *Linkletter* v. *Walker*, *supra* at 637. *See also Fuller* v. *Alaska*, *supra* at 81 (Regarding evidence seized in violation of § 605 of the Federal Communications Act, 47 U. S.C. § 605). Also, retrials of cases long closed inevitably would be made exceedingly difficult because of "unavailability of witnesses and dim memories." *Stovall* v. *Denno*, *supra* at 300. These and similarly onerous burdens on the administration of justice were very persuasive in convincing the Court to deny retroactivity in *Stovall* v. *Denno*, *supra* at 300 (denying retroactivity to *Wade* and

Gilbert), *Johnson* v. *New Jersey*, 384 U.S. 719, 730 (1966) (denying retroactivity to *Escobedo* and *Miranda*) and *Tehan* v. *United States*, 382 U.S. 406, 418-19 (1966) (denying retroactivity to *Griffin* v. *California*).

The minimal effect of retroactively applying *Marchetti* and *Grosso* is apparent from a comparison of their impact with the potential impact of the cases mentioned above. This minimal effect on the administration of justice is a persuasive reason in favor of applying *Marchetti* and *Grosso* retroactively.

Even assuming, contrary to the facts, that the retroactivity of *Marchetti* and *Grosso* would disappoint reliance in a relevant way and would place a significant burden on the adminstration of justice, retroactivity would still be justified because of the overriding importance of *Marchetti* and *Grosso's* purpose.

Six new constitutional rules have been applied retroactively even though they disappointed reliance and placed a burden on the administration of justice. These new rules were pronounced in *Griffin* v. *Illinois*,[7] *Gideon* v. *Wainwright*,[8] *Jackson* v. *Denno*,[9] *Bruton* v. *United*

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[7] 351 U.S. 12 (1956). *Griffin* held that a state must furnish trial transcripts to indigents on appeal. This rule has been applied retroactively in *Eskridge* v. *Washington Prison Board*, 357 U.S. 214 (1958). In *Eskridge* the defendant had originally been convicted in 1935.

[8] 372 U.S. 335 (1963). *Gideon* held that counsel must be appointed for indigents in felony cases. The retroactivity of this rule has been established in a host of cases. *E.g.*, *Williams* v. *Alabama*, 341 F.2d 777 (5th Cir. 1965), *United States ex rel. Durocher* v. *LaVallee*, 330 F.2d 303 (2d Cir. 1964).

[9] 378 U.S. 368 (1964). *Jackson* held unconstitutional New York's method of determining the voluntariness of confessions. Lower federal courts have had varying opinions as to *Jackson's* retroactivity. Compare *United States ex rel. Milford* v. *McMann*, 231 F. Supp. 731 (N.D.N.Y.) 1964) (retroactivity doubted). This Court has not directly ruled on the retroactivity of *Jackson* but in *Linkletter*, 381 U.S. at 628-29 n. 13 and in *Roberts* v. *Russell*, 392 U.S. 293, 294 (1968), the Court clearly indicates that *Jackson* does have retroactive effect.

States,[10] *Witherspoon* v. *Illinois*,[11] *and Barber* v. *Page*.[12]

Marchetti and *Grosso* are similar to *Griffin* v. *Illinois*, *Gideon*, *Jackson*, *Bruton*, *Witherspoon* and *Barber* in that the purpose of the new constitutional standards involved is of overriding significance. *Marchetti* and *Grosso* do not merely establish an evidentiary bar as does *Mapp;* they instead establish a complete bar to prosecution.[13] They are designed to prevent the implementation of a statutory scheme whose very definitions of crime are in derogation of the rights guaranteed by the Fifth Amendment. The newly recognized rule goes to the very integrity of the prosecutorial process.

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[10] 391 U.S. 123 (1968). *Bruton* overruled *Delli Paoli* v. *United States*, 352 U.S. 232 (1957), and "held that, despite instructions to the jury to disregard the implicating statements in determining the co-defendant's guilt or innocence, admission at a joint trial of a defendant's extrajudicial confession implicating a codefendant violated the codefendant's right of cross-examination secured by the confrontation clause of the Sixth Amendment." *Roberts* v. *Russell*, 392 U.S. 293 (1968). In *Roberts*, the Court held that *Bruton* is to be fully retroactive.

[11] 391 U.S. 510 (1968). *Witherspoon* held that no defendant can be constitutionally put to death on a conviction by a jury from which those with conscientious or religious scruples to the death penalty have been excluded. In a footnote the Court refuses to apply its new rule prospectively only, and clearly indicates that it will be given fully retroactive effect. *Id.* at 523 n. 22.

[12] 390 U.S. 719 (1968). *Barber* held that "the absence of a witness from the jurisdiction would not justify the use at trial of preliminary hearing testimony unless the State had made a good-faith effort to secure the witness' presence." It was held retroactive in *Berger* v. *California*, 393 U.S. 314, 315 (1969).

[13] This is illustrated by the fact that in *Marchetti* the constitutional objection was raised for the first time on a motion to arrest judgment. 390 U.S. at 41-42. *See also* Brief for Petitioner, *Marchetti* v. *United States*, No. 38, O.T. 1966 (renumbered No. 2, O.T. 1967), p. 3. The relief to which this Court held that Marchetti was entitled was available only "if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." Rule 34, Fed. R. Crim. P.

(2) THE GOVERNMENT HAS CONCEDED THAT PARTIAL RETROACTIVITY IS PROPER IN CRIMINAL CASES — A CONCESSION THAT MILITATES STRONGLY IN FAVOR OF FULL RETROACTIVITY.

Marchetti and *Grosso* have already been given partially retroactive effect; that is, this Court has already ordered application of the principles of *Marcheti* and *Grosso* to cases not yet final on the date of the *Marchetti* and *Grosso* opinions. In a series of per curiam orders, cases that were pending in this Court that involved federal wagering tax convictions were vacated and remanded to the various courts of appeal. *DeCesare* v. *United States,* 390 U.S. 200-05 (1968). The United States has accepted the propriety of partial retroactivity. *See* Brief for Petitioner at 29-31.

The same criteria set forth in *Stovall* for determining full retroactivity are utilized in determining whether a rule should be given partial retroactivity. *See DeStefano* v. *Woods,* 392 U.S. 631 (1968) (per curiam); *Stovall* v. *Denno,* 388 U.S. 293, 300-01 (1967); *Johnson* v. *New Jersey,* 384 U.S. 719, 732 (1966), *United States* v. *Tarrago,* 398 F.2d 621 (2d Cir. 1968) (court finds that *Stovall* test favors partial retroactivity of new insanity standards). Thus in determining that a rule should be given partial retroactivity, a court must be satisfiied that the purpose to be served by the new standards requires at least partial retroactivity; that the extent of reliance by law enforcement authorities on the old standards was not such that partial retroactivity should be denied; and that the effect on the administration of justice of a partially retroactive application of the new standards will not be unduly burdensome. The government is in agreement with this analysis. It argues in *Angelini* that:

> "In *Johnson, Stovall* and *DeStefano* the Court indicated that cases still on direct appeal and those involving collateral proceedings were to be treated identically, insofar as the applicability of the new rule was concerned. Indeed, in *Stovall*, the Court flatly stated that 'no distinction is justified between convictions now final * * * and convictions at various stages of trial and direct review' (388 U.S. at 300). Accordingly, the fact that Angelini is attacking the judgment of forfeiture directly, rather than collaterally, is of no consequence."

Brief for Petitioner at 31 & n. 11.

The Court, therefore, by holding *Marchetti* and *Grosso* partially retroactive under the *Stovall* test, has clearly indicated that the purpose of the new standards promulgated therein will be served by retroactive application. The only basis for denying full retroactivity after holding that partial retroactivity was required would be a determination that full retroactivity would be so burdensome on the administration of justice that it should be denied. As we have demonstrated, fully retroactive application of *Marchetti* and *Grosso* would upset only convictions that were obtained in derogation of the defendant's Fifth Amendment rights and would not impose any burden on the administration of justice. The same logic and findings that led the Court to hold *Marchetti* and *Grosso* partially retroactive compel the conclusion that they should be held fully retroactive.

CONCLUSION

For the foregoing reasons, Amicus submits that *Marchetti* and *Grosso* should be held fully retroactive in forfeiture and criminal proceedings. Alternatively, Amicus submits that *Marchetti* and *Grosso* should be held fully

retroactive in criminal proceedings even if held non-retroactive in forfeiture proceedings; or the question of their retroactivity in criminal proceedings should be reserved until directly presented to the Court.

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EXHIBIT A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 26316

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH P. LUCIA,

Defendant-Appellant.

No. 26317

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH P. LUCIA,

Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(September 17, 1969)

Before WISDOM and GODBOLD, Circuit Judges, and HUGHES, District Judge

WISDOM, Circuit Judge: This appeal turns upon whether the Supreme Court's decisions in *Marchetti* v. *United States*, 1968, 390 U.S. 39, 88 S.Ct. 687, 19 L.Ed.2d 889, and *Grosso* v. *United States*, 1968, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906, should be applied retroactively. We hold that they should be applied retroactively and reverse the judgment of the district court.

Joseph P. Lucia was indicted in the Southern District of Texas September 18, 1964, on various counts for violation of provisions of the federal statutory scheme for taxing illegal wagers. Lucia first pleaded not guilty to all counts of the indictment, but at his rearraignment January 18, 1965, he changed his plea to guilty to Count 12 of the indictment. That count charged him with attempting to evade the excise tax on wagering (1) by failing to file the required Form 730 (Tax on Wagering Returns), (2) by failing to keep certain records as required by 26 U.S.C. § 4403 and (3) by various acts of concealment, all in violation of 26 U.S.C. § 7201. The court dismissed the remaining counts.

That same day the United States Attorney filed a criminal information charging Lucia and others with conspiring willfully to fail to pay the federal excise tax on gambling, imposed by 26 U.S.C. § 4401, in violation of 18 U.S.C. § 371. The defendant again pleaded guilty. The court sentenced him to consecutive terms of six months on the conspiracy charge and five years on the evasion charge. It also imposed a $10,000 fine on each count. The court suspended the five-year sentence and put Lucia on probation. He has paid the fine and served the remaining six-month sentence.

In January 1968 the Supreme Court decided *Marchetti* and *Grosso*, cases holding that a defendant's assertion of

the privilege against self-incrimination under the Fifth Amendment is a bar to prosecution for violation of the federal laws taxing illegal wagers. Relying on these cases, Lucia filed a motion, in the nature of a writ of error coram nobis, to vacate and set aside judgments and sentences below. Lucia pointed out that although he had completed his sentence, he still remained on probation and was continuing to suffer certain civil disabilities as a result of his conviction. The district court held that *Marchetti* and *Grosso* had not voided the statutes under which Lucia had been convicted, but had merely provided a defense to them; a defense, the court said, that could not be applied retroactively. The court held also that Lucia's guilty plea waived all defenses, including any defense based upon his privilege against self-incrimination. This appeal followed the district court's denial of Lucia's motion.

I.

We disagree with the district court's holding that Lucia waived his self-incrimination defense when he pleaded guilty. The accepted definition of waiver, adopted by the Supreme Court in *Johnson* v. *Zerbst*, 1938, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466, is "an intentional relinquishment or abandonment of a known right or privilege". The courts will not accept an accused's loss of a constitutional right when he does not understand what he is losing. *Miranda* v. *Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 1602; *Boykin* v. *Alabama*, 1969, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274; also see Fed. R. Crim. P. 11. In *Boykin* the Court noted that among the "federal constitutional rights . . . involved in a waiver that takes place when a plea of guilty is entered . . . is the privilege against compulsory self-incrimination." The Court pointed out that the "requirement that the prosecution spread on

the record the prerequisites of a valid waiver is no constitutional innovation". As long ago as the decision in *Carnley* v. *Cochran*, 1962, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70, the Supreme Court had held: "Presuming waiver from a silent record is impermissible."

Lucia had no knowledge of his right against self-incrimination under the *Grosso* and *Marchetti* rule for, at the time, those cases had not been decided. In earlier cases, *United States* v. *Kahriger*, 1953, 345 U.S. 22, 73 S.Ct. 510, 98 L.Ed. 754, and *Lewis* v. *United States*, 1955, 348 U.S. 419, 75 S.Ct. 415, 99 L.Ed. 475, the Supreme Court had rejected the contention that prosecution under the federal gambling tax scheme violates the Fifth Amendment. Lucia, therefore, could not have "knowingly and intentionally" waived his privilege against prosecution: that privilege did not exist. *Johnson* v. *Zerbst* and *Miranda* v. *Arizona* invalidate the waiver of rights that the defendant's own inexperience or ignorance prevent him from knowing. By logical extension, these decisions rule out all the more strongly the waiver of a right, such as Lucia's, that is unknown not because of any infirmity on the defendant's part, but because it is unknowable.

This is a dictate of common sense. Precedent supports it. The Supreme Court has repeatedly held that a party cannot be said to waive a right that was judicially created *after* the supposed waiver. *Curtis Publishing Co.* v. *Butts*, 1967, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, a *civil* suit for libel, was tried before the Supreme Court's decision in *New York Times Co.* v. *Sullivan*, 1964, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, which recognized for the first time certain First Amendment defenses against libel claims. On appeal, the defendant raised a *New York Times* defense, but the court concluded that the right had been waived. The Supreme Court reversed:

> "As our dispositions of Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597, and other cases involving constitutional questions indicate, the mere failure to interpose such a defense *prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground.* Of course it is equally clear that even constitutional objections may be waived by a failure to raise them at the proper time, [citing case] but an effective waiver must, as was said in Johnson v. Zerbst, be one of a 'known right or privilege'." 388 U.S. at 143, 87 S.Ct. at 1985, 18 L.Ed.2d at 1104. (Emphasis added.)

If Curtis, a defendant in a *civil* case, did not waive an unannounced constitutional defense by his failure to raise it at trial, Lucia, an accused in a *criminal* case, did not waive his constitutional defense.

Grosso compels the same conclusion. The defendant there was charged with failure to pay both the occupational tax on gambling and the excise tax on gambling proceeds. At trial *Grosso* raised constitutional objections to the occupational-tax counts, but not to the excise-tax counts. The Supreme Court reversed, nonetheless, on *all* counts:

> "Given the decisions of this Court in Kahriger and Lewis, supra, which were on the books at the time of petitioner's trial, and left untouched by Albertson v. SACB, 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165, we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege." 390 U.S. at 71, 88 S.Ct. at 715, 19 L.Ed.2d at 913-914.

The United States contends that even if the waiver must be knowing, and if waiver of specific defenses at trial assumes knowledge of their existence, there is something special about a guilty plea that makes the possible defenses irretrievable: "a plea of guilty waives all defenses and

procedural defects which are not jurisdictional". That statement is true only when the defendant is able to assess the various defenses available to him, as well as the consequences of submitting to conviction. Otherwise, the requirements integral to accepting guilty pleas make no sense. See Fed.R.Crim. P. 11; *McCarthy* v. *United States*, 1969, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418; *Von Moltke* v. *Gilles*, 1947, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309. A plea of guilty is an abbreviated way of going down the list of possible defenses and privileges — right to counsel, jury trial, confrontation of witnesses, self-incrimination, etc. — and waiving each one.[1] The plea represents the relinquishment of a bundle of defenses, and has no magical implications with regard to finality beyond that. The whole does no exceed the sum of its parts. If one of the component waivers was ineffective because of the inadequate knowledge upon which it was made, the defect is not cured by virtue of the fact that the waiver was made implicitly, as part of a guilty plea.

In *Haynes* v. *United States*, 1968, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923, the Supreme Court upheld the privilege against self-incrimination as a valid defense to prosecution under the National Firearms Act, under a rationale similar to that in *Marchetti*. Haynes had pleaded guilty.

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[1] See United States ex rel. Rogers v. Warden of Attica State Prison, 2 Cir. 1967, 381 F.2d 209, 213:

> "[W]e must be wary of blindly applying . . . [the guilty plea waiver] doctrine to every case involving such a plea. There is nothing inherent in the nature of plea of guilty which ipso facto renders it a waiver of a defendant's constitutional claims. Rather, waiver is presumed because ordinarily such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state procedures . . ."

The Supreme Court in a footnote pointed out the absence of waiver: "Petitioner's plea of guilty did not, of course, waive his previous claim of constitutional privilege." 390 U.S. at 87, 88 S.Ct. at 725, 19 L.Ed.2d at 926.

Several post-*Marchetti* and *Grosso* decisions have rejected arguments that failure to assert the constitutional defense guaranteed by the Fifth Amendment, constituted a waiver of the defendant's constitutional rights. In *United States* v. *Manfredonia*, 2 Cir. 1968, 391 F.2d 229, the court said:

> "Since in *Marchetti* the privilege had been asserted at the trial, the government argues here that the appellants' failure to assert the privilege against self-incrimination as a defense at trial amounted to a waiver of protection . . . At the time of the trial of these appellants the wagering statutes were valid and the decisions in Lewis v. United States, 1955, 348 U.S. 419, 75 S.Ct. 415, 99 L.Ed. 475 and United States v. Kahriger, 1952, 345 U.S. 22, 73 S.Ct. 510, 97 L.Ed. 754 were still applicable. There is no reason to suspect that appellants knowingly waived their Fifth Amendment privilege at trial. These defendants should not be required to anticipate the Supreme Court action overruling Lewis and Kahriger or compelled to make the futile gesture of raising the privilege at trial to preserve their rights in the event of an overriding decision. We believe the effect of the Supreme Court decisions in *Machetti* and *Grosso* is to prevent enforcement of the wagering statutes as they are now designed because of the 'substantiality of the risks of incrimination.'" 391 F.2d at 230.

Accord: *Harris* v. *United States*, 8 Cir. 1968, 390 F.2d 616; *United States* v. *Lookretis*, 7 Cir. 1968, 398 F.2d 64. See also *United States* v. *Butler*, 5 Cir. Nos. 22,274 and 23,055, aff'd 361 F.2d 266; vacated and remanded for further consideration in light of *Marchetti* and *Grosso;*

De Cesare v. *United States*, 1968, 390 U.S. 200, 88 S.Ct. 900, 19 L.Ed.2d 1026. Although these cases were all direct appeals from judgments which had not become final, the rationale on which they rest is applicable to the case before the Court.

We conclude that Lucia's failure to raise the self-incrimination defense in the trial court and his plea of guilty did not prevent his raising the point in the present action. *See United States* v. *Miller*, 4 Cir. 1969, 406 F.2d 1100.

II.

The test for deciding the retroactivity of new constitutional standards of criminal procedure has been progressively developed in a recent line of Supreme Court decision.[2] *Linkletter* v. *Walker*, 1965, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601; *Tehan* v. *Shott*, 1966, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453; *Johnson* v. *New Jersey*, 1966, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882; *Stovall* v. *Denno*, 1967, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199; *Desist* v. *United States*, 1968, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248. *Stovall* sets out the formula to be applied in each case:

> "The criteria guiding resolution of the questions implicate (a) the purpose to be served by the new stand-

[2] Commentators have been active in this area. See Bender, The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio, 110 U. Pa. L. Rev. 650 (1962); Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 U. Va. L. Rev. 201 (1965); Meador, Habeas Corpus and the "Retroactivity" Illusion, 50 U. Va. L. Rev. 1115 (1964); Mishkin, The Supreme Court, 1964 Term Foreward: The High Court, the Great Writ and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965); Schaeffer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U.L. Rev. 631 (1967); Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719 (1966).

ards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 388 U.S. at 297, 87 S.Ct. at 1970, 18 L.Ed.2d at 1203.

"Foremost among these factors is the purpose to be served by the new court rule." *Desist* v. *United States,* 394 U.S. at 249. As the Court pointed out in *Desist* "it was principally the Court's assessment of the purpose of *Mapp* v. *Ohio,* 1961, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, which led it in *Linkletter* to deny those finally convicted the benefit of *Mapp's* extension of the exclusionary rule to the states," 394 U.S. at 249. The exclusionary rule is "based on the necessity for an effective deterrent to illegal police action". When the court has made its rulings prospective only, it has done so on the rationale that the damage caused by the improper governmental behavior will not be undone or repaired by reversing existing convictions. Thus in *Linkletter,* the defendant's privacy had already been breached by an illegal search. In *Mapp* v. *Ohio,* the fruits of such searches were held inadmissible at trial. The deterrent purpose of the *Mapp* rule would not "be advanced by making the rule retrospective. The misconduct of the police has already occurred and will not be corrected by releasing the prisoners involved". *Linkletter,* 381 U.S. at 637.

In contrast, new constitutional rules going to the fundamental fairness of a trial, the accuracy and reliability of the fact-finding process, rules that substantially reduce the likelihood that an innocent person will be convicted, have received retroactive application. For example, in *Bruton* v. *United States,* 1968, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, overturning *Delli Paoli* v. *United States,* 1957, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278, the court held that the admission of a defendant's extra-judicial confes-

sion implicating a co-defendant violates the co-defendant's right to confront his accuser under the Sixth Amendment. In *Roberts* v. *Russell*, 1968, 392 U.S. 293, 295, 88 S.Ct. 1921, 1922, 20 L.Ed.2d 1100, 1103, the Court held that "[this] constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined." The purpose of the new *Bruton* rule, greater accuracy in guilt-determination, applied to past as well as future trials, and the Court therefore extended *Bruton* retroactively.

There is no doubt that at the time of Lucia's arrest, indictment, and trial, the prosecution relied on the state of the law as represented by *United States* v. *Kahriger* and *Lewis* v. *United States*. The *Stovall* factor of reliance therefore weighs against retroactive application of the *Marchetti-Grosso* rule. We feel, however, that we should give greater weight to the purpose of *Marchetti* and *Grosso*[3] than to the factor of reliance. The purpose of the *Marchetti-Grosso* rule is to protect the constitutional privilege against a statutory system jeopardizing it. The purpose is not to deter unlawful police action. Nor is it to sharpen the fact-finding process. It does not involve guilt or innocence. Indeed, "the constitutional privilege was intended to shield the guilty and the imprudent as well as the innocent and foresighted . . ." *Marchetti* 390 U.S. at 51. The Supreme Court concluded that the objective of the statute — to force disclosure by punishing silence — was improper. Since the aim of the statute is constitutionally impermissible, courts should not continue to enforce its sanctions. Stated in terms of balancing *Stovall* factors, we consider the preservation of the Fifth Amendment privilege against self-incrimination more important than the fact that the government re-

[3] See Desist v. United States, 1969, 394 U.S. 244, 249n.14, 89 S.Ct. 1030, 22 L.Ed.2d 248.

lied on earlier — now overruled — decisions. We disagree, therefore, with the conclusions the Sixth Circuit reached in *Graham* v. *United States,* 6 Cir. 1969, 407 F.2d 1313.

The third *Stovall* factor is the extent of the burden on the administration of justice that would result from retroactivity. The number of offenders presently in jail under the federal gambling tax laws must be small indeed. The government acknowledged in its brief that no one had been prosecuted under the wagering laws since the Supreme Court decided *Marchetti* and *Grosso.* According to the brief, 17 persons of the 1262 convicted under these laws in 1965 and 1966 received prison terms longer than one year. We do not have to fear a wholesale emptying of the jails. Nor will the courts and United States Attorneys be taxed with retrying old offenses on the basis of stale evidence. In short, the practical effects of retroactivity in this case will be minimal.

Marchetti and *Grosso* rest upon the constitutional principle that a man's dignity is violated when he is forced into the dilemma of either speaking against himself or suffering criminal sanctions. Lucia's dignity has already been violated, since the government has long since indicted, tried, and punished him. In that sense the harm to him cannot be repaired, and he stands in *Linkletter's* position. Unlike *Linkletter,* however, he stands convicted of no act that the government now can legitimately punish.

The judgment of the district court is REVERSED and the cause is REMANDED for disposition consistent with this opinion.